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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 768

EDMUND D. OSBOURNE, ET AL., APPELLANTS

v.

MISSISSIPPI VALLEY BARGE LINE CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from that portion of an order of a three-judge district court (J.S. 43–46) which enjoined appellants, Edmund D. Osbourne and the Pittsburgh Towing Company, from conducting water-carrier operations under Certificate No. W–364. This order was entered in aid of the court's earlier judgment (252 F. Supp. 162; J.S. 59–60) invalidating a transfer of the franchise to Pittsburgh Towing

Company, then wholly owned by Osbourne (324 I.C.C. 460; J.S. 64–97), and to enforce the Commission's subsequent order effectuating the court's decree (J.S. 61–63).

The original action was instituted in 1964 by Mississippi Valley Barge Line Company (Mississippi), to have set aside the orders of the Commission authorizing the transfer of water-carrier Certificate No. W–364 from Charles Zubik to Pittsburgh Towing Company under the authority of 49 U.S.C. 912.[1] American Commercial Lines and Union Barge Line Corporation intervened as plaintiffs, and Pittsburgh Towing Company, as defendant. The district court enjoined the Commission's orders, finding that the Commission had approved the transaction on the misunderstanding that the transferee would be merely Zubik's corporate form, whereas in fact "Osbourne was the sole owner of the corporation" (252 F. Supp. 164; J.S. 53). Concluding that the authorization of the transfer had been secured by concealment and deceit (252 F. Supp. 166; J.S. 56–58), the district court ordered it set aside.

The Commission, in compliance with the district court's decree, served an order on May 5, 1966, vacating its earlier orders approving the transfer; but before the Commission's order became effective, the district court entered a stay pending Pittsburgh Towing's appeal to this Court. That appeal was dismissed

[1] Finance Docket No. 21193, *Pittsburgh Towing Company—Certificate Transfer—Charles Zubik*. The Commission's report on reconsideration, 324 I.C.C. 460 (J.S. 64–97), was entered with leave of court after the action had been begun.

on November 7, 1966, for failure to meet the time requirements for docketing the appeal (385 U.S. 32, J.S. 96–100; rehearing denied, 385 U.S. 995). The Commission thereafter, by order served January 17, 1967 (J.S. 61–63), had the Pittsburgh Towing Company's tariff stricken from its files "for the reason that [the] Company is no longer authorized to conduct the operations covered by said tariff and supplements" and directed the Company to cease operations under Certificate No. W–364.[2]

On January 20, 1967, a tariff entitled "Tariff I.C.C. No. 1 of Charles Zubik (Charles Zubik, Jr., Executor and Virginia Zubik Drambel, Executrix)" was filed with the Commission, purportedly issued by "Charles Zubik, Jr., Executor".[3] On February 8, 1967, Mississippi filed a motion with the Commission to strike the tariff summarily, alleging that Osbourne was continuing to operate under Certificate No. W–364 and that the tariff filed was in fact his rather than the

[2] The transfer application itself was denied by order of the Commission entered February 17 and served February 27, 1967.

[3] Charles Zubik, Sr., to whom the certificate had been issued, had died on August 25, 1966. His son and daughter were appointed executors of the Estate of Charles Zubik; and by affidavit executed September 26, 1966, they confirmed the contracts for the sale of Certificate No. W–364 to Osbourne. Following dismissal of Pittsburgh Towing Company's appeal to this Court, the executors, on January 10, 1967, executed a power of attorney authorizing Osbourne personally "to perform and execute all business transactions, including the filing of tariffs and other documents with the Interstate Commerce Commission in connection with the operation of the Interstate Commerce Commission Certificate W–364." That power of attorney was subsequently revoked by the executors.

Zubik Estate's. The Commission denied the motion on the following day for want of sufficient grounds. Mississippi, on April 6, 1967, moved the district court in this action for an order requiring the Commission to show cause why, in the light of the district court's judgment, the tariff should not be stricken from the Commission's files. On May 5, 1967, following oral argument, the three-judge district court entered the show cause order, returnable July 6, 1967. By the same order the district court allowed the intervention of Charles Zubik, Jr., and Virginia Zubik Drambel.

In the meantime an informal investigation by the Commission's staff into the operations under Certificate No. W–364 revealed that Osbourne was indeed continuing to operate under color of the Zubik certificate. As a result of this investigation, the Commission, on June 16, 1967, moved the district court for an injunction to enforce the court's earlier judgment and the Commission's order of January 17, 1967, entered in implementation thereof, alleging that Pittsburgh Towing, Osbourne, and the executors were seeking to achieve by evasion and fraud what they could not accomplish lawfully.

At the hearing before the three-judge district court on July 6, 1967, counsel for Osbourne and Pittsburgh Towing Company objected to the service of process and to the jurisdiction and venue of the district court. On request, the court then issued orders to show cause, directed to Osbourne, the Company, and the executors, and service of the Commission's motion was effected. When the hearings resumed on July 27, 1967, counsel for Osbourne and Pittsburgh Towing

renewed his jurisdictional objections. He stipulated, however, that the testimony introduced at the July 6, 1967, hearing should be incorporated by reference, and he participated in the examination and cross-examination of the four additional witnesses, including Osbourne (who was called both by the Commission and in his own behalf).

The three-judge district court filed its opinion and orders on July 31, 1967 (J.S. 30–48). The court, after summarizing the evidence, concluded:

> The preceding facts lead to one inescapable conclusion; that is, that Edmund D. Osbourne, through Charles Zubik, Jr. and Virginia Zubik Drambel, Executors of the Estate of Charles Zubik, is employing but another subterfuge, as he previously did with Pittsburgh Towing Company, to avoid compliance with the decree of this court and with the judgment and order of the Commission. This court's decree in this case had the effect of permanently enjoining Pittsburgh (Osbourne's alter ego) from conducting any operations under W–364 until it complied with the rules and regulations of the Commission. It is evident that Osbourne has not ceased his illegal operation under W–364, but has merely changed names, and is now operating in the same manner as before the court's decision, and using the Zubik name for operations instead of Pittsburgh as his alter ego. There has been a vain attempt to show that the operation of the certificate is now by Zubik, Jr., and not Osbourne, but the facts show otherwise.
>
> In the final analysis, the only operation

that could be and is continuing under W-364 at this time is that of Osborne. [J.S. 49.]

The three-judge district court thereupon perpetually enjoined Osbourne and Pittsburgh Towing Company, acting in any form, from directly or indirectly conducting water-carrier operations under Certificate No. W-364 (J.S. 43-46).[4] Osbourne and Pittsburgh then filed the instant appeal from the entry of the permanent injunction.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

Indeed, the only question posed by the appeal is whether a court is empowered in ancillary proceedings to frame a decree to compel compliance with its prior judgment and with the order of the Interstate Commerce Commission entered in accordance therewith. To state the question is to answer it. "That judicial power essentially involves the right to enforce the results of its exertion is elementary." *Virginia* v. *West Virginia*, 246 U.S. 565, 591.

[4] With respect to the tariff filed on behalf of the Zubik Estate, the district court remanded the matter to the Commission for further consideration of whether that tariff should be stricken (J.S. 47-48). The Commission, relying upon the district court's conclusions that the operations conducted under the tariff had been those of Osbourne rather than the Zubik Estate, by order served September 11, 1967, ordered the tariff stricken from its files. An action by the executors challenging the validity of the Commission's strike order has been voluntarily dismissed. *Charles Zubik, Jr., et al.* v. *United States*, United States District Court for the Eastern District of Missouri, Eastern Division, Civil Action No. 67C 328(1).

1. It is clear that courts—including three-judge courts—possess inherent power to enforce their mandates, even though in doing so they may be obliged to reach parties or to decide matters which may not have been within their jurisdiction in the original causes of action. Thus, in *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 484 (C.A. 7), where the court exercised its equitable powers in aid of its earlier judgment reviewing the actions of the Federal Power Commission, the principle was explained:

> Where a court has jurisdiction of a cause of action and the parties, it has jurisdiction also of supplemental proceedings which are a continuation of or incidental to and ancillary to the former suit even though the court as a federal tribunal might not have had jurisdiction of the parties involved in the ancillary proceeding if it were an original action. In other words, inasmuch as such jurisdiction is ancillary, a federal court is not precluded from exercising it over persons not parties to the judgment sought to be enforced. [Citations omitted.]

Accord: *Central National Bank* v. *Stevens*, 169 U.S. 432, 464; *Labette County Commis'rs* v. *Moulton*, 112 U.S. 217, 221; *In re Federal Facilities Realty Trust*, 220 F. 2d 495, 501 (C.A. 7); *United States* v. *Manning*, 215 F. Supp. 272, 291 (W.D. La.).

The power of a district court to enter a decree to compel compliance with its prior judgment is buttressed by the All Writs Statute, 28 U.S.C. 1651(a). See *Federal Trade Commission* v. *Dean Foods Co.*,

384 U.S. 597, 603–608. As was said in *United States* v. *Wallace,* 218 F. Supp. 290, 292 (N.D. Ala.):

> Too well settled in the law to admit of persuasive arguments to the contrary are the twin propositions that the courts of the United States have statutory authority under 28 U.S.C. § 1651 as well as inherent power to enter such orders as may be necessary to effectuate their lawful decrees and to prevent interference with and obstruction to, their implementation, and that the United States has standing to seek the injunctive relief for which it prays. [Citations omitted.]

Accord: *Bullock* v. *United States,* 265 F. 2d 683, 690–691 (C.A. 6), certiorari denied, 360 U.S. 909. See, also, 28 U.S.C. 1345.

Moreover, the Commission is specifically authorized to seek judicial enforcement of its orders. 49 U.S.C. 916; 28 U.S.C. 1336. See, also, 49 U.S.C. 42. Here the Commission after appropriate investigation ascertained that appellants' conduct contravened its order implementing the court's prior decree, and accordingly, joined by the United States, moved for enforcement of its order as well as of the judicial decrees.[5]

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[5] Appellants' jurisdictional arguments are without merit. Osbourne and the executors were brought within the power of the court by virtue of the show cause orders served on them. Under 28 U.S.C. 2321, process in Interstate Commerce Commission enforcement cases runs throughout the United States. On the merits, there was ample basis for making them subject to an injunction designed to enforce the prior orders, since the court correctly found that they had actual notice of those orders and were acting in concert with Pittsburgh Towing in subverting the restrictions imposed by the earlier orders. See F.R. Civ. P. 65.

2. There is no substantial question with respect to the correctness of the award of supplementary injunctive relief in this case. The district court's prior judgment, invalidating the Commission's authorization of the transfer of Certificate W-364 from Charles Zubik to the Pittsburgh Towing Company, together with the Commission's order of January 17, 1967, forbade further water-carrier operations by Pittsburgh Towing under that franchise. Yet, six months after the Company's appeal to this Court had been dismissed, the district court, upon an evidentiary record which the appellants concede contained no conflicts (J.S. 11), found that Osbourne, using yet another corporate device, was operating precisely as he had done before. The illegality of the operations was clear and already established, and further proceedings before the Commission were not required by principles of primary jurisdiction.

3. There remains only the challenge to the breadth of the injunction. Upon further consideration, we have concluded that the district court's order is broader than necessary insofar as it *perpetually* enjoins appellants from transporting or holding out to transport property under the authority of Certificate No. W-364, and *perpetually* prohibits the executors from *in any manner* aiding appellants to conduct water-carrier operations under this certificate. The court interpreted its earlier order as precluding Pittsburgh Towing from conducting operations under the certificate only "until it complied with the rules and regulations of the Commission" (J.S. 40). Since the instant injunction might be read to prevent resort to

lawful Commission procedures for transfer of the certificate, we believe it is in this respect needlessly sweeping. In our view, however, this question does not warrant action by this Court. Rather, we suggest that this Court affirm the order of the district court, but without prejudice to an appropriate motion in the court below for modification of the injunction to conform to the court's earlier specification. The United States and the Commission would be prepared to join in urging that such a motion be granted. In all other respects, we believe that the district court's order was fully justified and indeed necessary to compel compliance with the prior judgments of the Commission and the district court.

CONCLUSION

For these reasons, the judgment should be affirmed with the condition suggested above.

Respectfully submitted.

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